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No. 08-858

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JEANNE E. CALDWELL,

Petitioner,

v.

ROY L. CALDWELL, PH.D., in his official capacity as Director of the University Of California Museum Of Paleontology; DAVID LINDBERG, in his official capacity as Chair of the Integrative Biology Department of the University of California-Berkeley; and MICHAEL D. PIBURN, in his official capacity as Program Director for the National Science Foundation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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U.S. Const. art. III 3, 6, 7

U.S. Const. amend. I ..... *passim*

Petitioner, Jeanne E. Caldwell ("Jeanne Caldwell"), submits the following Reply in support of her Petition for Writ of Certiorari.

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

In their Opposition, Respondents Roy L. Caldwell and David Lindberg ("the University"), raise two new points that are closely related. First, the University echoes Judge Fletcher's concurring opinion in calling for an exception to the normal standing rules for citizens who experience a so-called *de minimis* interference with their right to unreservedly use a government resource without encountering an unwanted and unwelcome governmental religious statement in violation of the Establishment Clause. As explained below, this proposition represents a radical departure from this Court's jurisprudence on standing to pursue Establishment Clause violations, which should be rejected. Second, the University makes a factual statement in support of the contention that its interference with Jeanne Caldwell's use of *Understanding Evolution* is *de minimis* that is inaccurate. As explained below, the true facts, as reflected in the Record on Appeal, show that the *Misconception: Evolution and Religion Are Incompatible* webpage is an integral part of *Understanding Evolution* that appears to have been designed to carry out an express purpose of the University in creating *Understanding*

Evolution – to respond to, and hopefully diminish, the influence of citizens such as Jeanne Caldwell in the religious debate over evolution and how it should be taught in our public schools. With this purpose in mind, it is to be expected that Jeanne Caldwell's direct exposure to statements by the University on the *Misconception: Evolution and Religion Are Incompatible* webpage that criticize her own religious belief and endorse opposing religious beliefs would cause her injury in fact.

II.

THE PROPOSED *DE MINIMIS* IMPAIRMENT EXCEPTION ADVOCATED BY THE UNIVERSITY IS A SIGNIFICANT DEPARTURE FROM ARTICLE III STANDING RULES

In its "Counterstatement of Question Presented," the University poses a novel exception from standing to pursue Establishment Clause claims: A *de minimis* impairment in the use of a government website is insufficient injury to confer standing. (Opp., page i). The University provides minimal analysis for its proposed exception, other than a citation to Judge Fletcher's description of Jeanne Caldwell's injury as *de minimis* in her concurring opinion. (Opp. 8, fn. 8; Opinion at 14093). The University's proposed *de minimis* impairment exception appears to be based on the notion that a violation of the Establishment Clause that interferes with a citizen's ability to use only a portion of a government website is the equivalent of an "*abstract, generalized grievance.*"

(Opp. 8, fn. 8). On this basis, it is argued that such a citizen has no Article III standing to challenge such an Establishment Clause violation.

The premise is flawed, for this court has never equated an *abstract, generalized grievance* with a *de minimis* constitutional injury. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 470 (1982); *Federal Election Commission v. Akins*, 524 U.S. 11 (1998); *Secretary of State of Maryland v. Munson*, 476 U.S. 947 (1984); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

There is good reason for this. Whether a toe is stubbed or a leg is broken, both are actual injuries, though they are different in terms of severity. And so it is with Establishment Clause violations. "There are no *de minimis* violations of the Constitution – no constitutional harms that are so slight that the courts are obliged to ignore them." *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 36-37 (2004) (O'Connor, J., concurring in judgment).

An *abstract, generalized grievance* occurs when the plaintiff has no actual connection with the alleged violation. Such was the case in *Valley Forge,* wherein the complainants had never been to the property in question, but had merely learned of the matter from a news release. *Id.*, at 469. In contrast, Jeanne Caldwell has actually used *Understanding Evolution* for its intended purpose, and she has come into direct

contact with the governmental religious statement that violates the Establishment Clause.

This Court should grant Caldwell's Petition for Writ of Certiorari to put to rest any notion that *de minimis* violations of the Establishment Clause are acceptable, and to put to rest the University's corollary proposition that a citizen's direct exposure to a *de minimis* violation of the Establishment Clause does not result in injury in fact sufficient to support standing to bring a claim based on such Establishment Clause violations.

III.

THE *MISCONCEPTION: EVOLUTION AND RELIGION ARE INCOMPATIBLE* PAGE IS AN INTEGRAL COMPONENT OF THE WEBSITE

A key contention of the Opposition filed by the University is that the *Misconception: Evolution and Religion Are Incompatible* webpage, at the heart of this dispute, is purportedly not a very significant component of the *Understanding Evolution* website. (See, e.g., Opp. 5, fn. 5). This contention is offered as the primary evidence in support of the University's *de minimis* impairment argument discussed above. In support of this contention, the University makes the following statement in the Opposition:

> The petition's reference to petitioner's "discovery" that "the primary purpose of the entire Understanding Evolution website was to combat the 'influence of . . . Christian

> fundamentalists such as herself' refers to new facts that do not appear in the complaint or anywhere else in the record, and which completely misrepresents the express and apparent educational purpose of the UE site.
>
> (Opp. 6, fn 7).

Jeanne Caldwell begs to differ. The record in this action includes the University's Grant Application submitted to the National Science Foundation to obtain most of the funding for *Understanding Evolution*. (Record on Appeal 227-239).[1]

The introductory section of the Grant Application entitled, "Need for the Project," references "[t]he influence of a minority of vocal Christian fundamentalists throughout the country on the development of curricula and the adoption of instructional materials has increased in recent decades" as one of the primary justifications for the *Understanding Evolution* website. (ROA 228). Clearly, a primary purpose of the University of California in creating *Understanding Evolution* was to respond to – and hopefully diminish the influence of – "a minority of vocal Christian fundamentalists" in the religious debate over evolution.

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[1] Petitioners believe that the misstatement by the University was not intentional and likely occurred because the federal co-respondent filed the Application in the District Court. In any event, this Court can order the record to verify the language recited by Petitioner. The facts in this case are not complex and, except for this oversight by the University, not in dispute.

The University's Grant Application also acknowledges that evolution is "the most controversial subject in science." (ROA 228).

In this context, it is also not surprising a citizen holding a religious belief the University deems to be *Christian fundamentalist* would feel like an outsider when reading the *Misconception: Evolution and Religion Are Incompatible* webpage. After all, the original version of the webpage described that religious belief as "divisive" (App. 52) and the revised version of the webpage describes that religious belief as *incorrect*. (Pet. 5). As a result, Jeanne Caldwell cannot use the government website unreservedly without encountering offensive and unwanted statements denigrating her own religious belief and endorsing contrary religious beliefs. Since the University of California's stated purpose for creating *Understanding Evolution* was to diminish the impact of *Christian fundamentalists*, it is to be expected that a citizen holding that religious viewpoint would suffer injury when using the webpage of *Understanding Evolution* that goes to the heart of the religious debate over evolution.

IV.

CONCLUSION

The University claims in its opposition that the issue of internet liability as it relates to the Establishment Clause is resolved by mere application of past Art. III precedent. (Opp. 13-20). But by

presenting its own novel approach to determining standing within the context of a government internet site, the University's opposition unwittingly demonstrates why granting the petition is appropriate. In sum, the parties are presenting two competing formulas for Art. III standing when an alleged Establishment Clause violation occurs on the internet. This is not surprising in that this is a case of first impression. As such, the petition for certiorari should be granted to resolve this important issue and thus give guidance to lower courts and other state actors.

Respectfully submitted,

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